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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA  
**(HONORABLE LOUISA S. PORTER)**

UNITED STATES OF AMERICA,	)	Case No.	08cr1559-H
	)		
Plaintiff,	)	DATE:	June 10, 2008
	)	TIME:	2:00 P.M.
v.	)		
	)	<b>DEFENDANT'S RESPONSE AND</b>	
<b>JULIO CESAR NUNEZ-GOMEZ,</b>	)	<b>OPPOSITION TO MATERIAL WITNESS'</b>	
	)	<b>MOTION FOR VIDEOTAPED</b>	
Defendant.	)	<b>DEPOSITIONS</b>	
_____	)		

**I.**

**STATEMENT OF FACTS<sup>1</sup>**

**A. The Stop and Arrest of Mr. Nunez-Gomez**

On May 2, 2008, National Guard officers manning the West Scope area observed seven people on bikes traveling through an area known as Goat Canyon. At 3:00 a.m. Border Patrol Agent Cooper responded to the area, and along with an unnamed agent, detained the seven individuals. It is alleged that Mr. Nunez-Gomez was detained separately from the other six individuals. When he was detained, Mr. Nunez-Gomez allegedly made statements that he had no documents to legally enter the United States.

<sup>1</sup> Unless otherwise stated, the "facts" referenced in these papers come from the complaint. Defense counsel has yet to receive discovery in this case.

1 The complaint then states that Mr. Nunez-Gomez as well as the other individuals were arrested at 2:00 a.m.,  
2 an hour before the National Guard alerted the border patrol agents that they were spotted in Goat Canyon.

3 **B. Interrogation**

4 At the border patrol station, it is alleged that Mr. Nunez-Gomez was read his Miranda rights and  
5 questioned regarding the incident. Mr. Nunez-Gomez made statements regarding his involvement in the  
6 offense. He indicated that he is a foot guide in the Imperial Beach area working for "El Gallo." Mr. Nunez-  
7 Gomez made statements admitting payment of \$200.00 per person brought in. After bringing the  
8 individuals into the United States on bicycle, he was planning on taking them to Hollister Road where  
9 another individual would take them to a load house.

10 It is alleged that all the material witnesses were to pay between \$2000 and \$2500 to be brought into  
11 the United States and identified Mr. Nunez-Gomez as their guide.

12 **C. Trial**

13 On May 14, 2008, Mr. Nunez-Gomez was indicted for encouraging and inducing an alien to enter  
14 and reside in the United States in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and (B)(iii).

15 Counsel for the material witnesses filed a motion requesting a video deposition and the witnesses  
16 release to allow for removal of material witnesses to Mexico. Defense counsel on behalf of Mr. Nunez-  
17 Gomez objects to the release of the material witness, and requests that the Court either detain them or  
18 modify their bond so they can remain legally in the United States until the trial is over or the case is  
19 resolved.

20 **II.**

21 **THE MOTION FOR THE MATERIAL WITNESSES' DEPOSITION SHOULD BE DENIED**  
22 **BECAUSE THERE IS NO SHOWING OF UNAVAILABILITY OF THE WITNESS AND THE**  
**MOTION IS MADE PREMATURELY**

23 Title 18, United States Code § 3144 governs the detention of individuals who may give testimony  
24 material to a criminal proceeding. This section provides that where the witness is not able to meet the  
25 conditions of the bond set by the court and is detained, the court may order the deposition of the witness  
26 where (1) deposition may secure the testimony of the witness and (2) further detention is not necessary to  
27 prevent a failure of justice. See 18 U.S.C. § 3144. In this case, the material witnesses have moved for  
28 videotaped depositions pursuant to 18 U.S.C. § 3144. Although a deposition may secure the material

witnesses' testimony, this Court should order the material witnesses' continued detention in order to protect Mr. Nunez-Gomez's constitutional rights. In the alternative, this Court should modify the conditions of release so that the material witnesses can remain in the United States until this case is resolved.

Depositions in criminal cases are generally disfavored for several reasons, including the threat to the defendant's Sixth Amendment confrontation rights. United States v. Drogoul, 1 F.3d 1546, 1551-52 (11th Cir. 1993). All defendants have the right to confront witnesses against them. See U.S. CONST. Amend. VI. The Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), reaffirmed this principle — developed at common law and incorporated into the Confrontation Clause of the Sixth Amendment by the Framers — that testimonial statements may not be admitted against a defendant where the defendant has not had the opportunity to cross-examine the declarant. This is true even where the statements fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.” Id. at 60.

In Crawford, the Supreme Court noted that the Sixth Amendment was drafted in order to protect against the “civil-law mode of criminal procedure” and “its use of *ex parte* examinations as evidence against the accused.” Id. at 50. Such *ex parte* examinations implicate Sixth Amendment concerns because they are “testimonial” in nature. The “text of the Confrontation Clause reflects this focus” and applies to “witnesses against the accused - in other words, those who bear testimony.” Id. at 51 (internal quotations omitted). Although the Supreme Court declined to define “testimonial” evidence, they noted that an “accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” Id. The Confrontation Clause does not permit such testimonial statements to be admitted at trial against an accused without the constitutionally prescribed method of determining reliability, *i.e.*, confrontation. Id. at 61-65. In other words, “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability [of the declarant] and a prior opportunity for cross-examination.” Id. at 68.

Despite Crawford's broad prohibition of testimonial statements at trial where the defendant has no opportunity to confront the witness, there are some situations in which depositions may nonetheless be taken. In these situations, the burden is on the moving party to establish *exceptional circumstances* justifying the taking of depositions. Drogoul, 1 F.3d 1546 at 1552 (citing United States v. Fuentes-Galindo,

1 929 F.2d 1507, 1510 (10th Cir. 1991)). The trial court's discretion is generally guided by consideration of  
2 certain "critical factors," such as whether (1) the witness is unavailable to testify at trial; (2) injustice will  
3 result because testimony material to the nonmoving party's case will be absent; and (3) countervailing  
4 factors render taking the deposition unjust to the nonmoving party. Id. at 1552.

5 When considering this issue, this Court must balance the interests of the government and the  
6 accused, as well as the interests of the material witnesses. Although the material witnesses may have a  
7 liberty interest at stake, that interest is outweighed by Mr. Nunez-Gomez's weighty constitutional rights  
8 of confrontation and due process of law. The Confrontation Clause serves several purposes: "(1) ensuring  
9 that witnesses will testify under oath; (2) forcing witnesses to undergo cross-examination; and (3)  
10 permitting the jury to observe the demeanor of witnesses." United States v. Sines, 761 F.2d 1434, 1441  
11 (9th Cir. 1985). It allows the accused to test the recollection and the conscience of a witness through cross-  
12 examination and allows the jury to observe the process of cross-examination and make an assessment of  
13 the witness' credibility. Maryland v. Craig, 497 U.S. 836, 851 (1989); Ohio v. Roberts, 448 U.S. 56, 63-64  
14 (1980). In a case such as the one, where the material witnesses have received the benefit of the Government  
15 refraining from pressing criminal charges in return for their testimony against the accused,<sup>2</sup> it is important  
16 that the jury see the reaction and demeanor of the material witnesses when they are confronted with  
17 questions that will bring out such facts in order for the jury to decide whether to believe their statements  
18 and/or how much credit to give to their testimony. The jury's ability to make such an assessment would  
19 be compromised by a videotaped deposition because the tape may not preserve subtle reactions of the  
20 witnesses under cross-examination that may favor the accused.

21 Moreover, the decision to grant video depositions is governed by Federal Rule of Criminal  
22 Procedure 15(a) which states that a material witnesses' deposition may be taken only upon a showing of  
23 "exceptional circumstances." United States v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998). The material  
24 witnesses here, however, has failed to demonstrate any "exceptional circumstances" justifying the

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25  
26 <sup>2</sup> This Court should be mindful of the fact that the only reason the Government has not charged  
27 the material witnesses with a crime is that the Government seeks to introduce their testimony against the  
28 accused. The material witnesses could have been charged with illegal entry under 8 U.S.C. § 1325, which  
carries a maximum sentence of six (6) months imprisonment. Needless to say, the Government would not  
concern itself with the material witnesses' liberty interests had it, in fact, charged them with this offense.

1 impingement of Mr. Nunez-Gomez's Sixth Amendment rights. Rather, the only hardship alleged by the  
2 material witnesses is that they entered the United States to find work to support family members at home  
3 in Mexico. See Mayer Decl. at 4. Nowhere does Mr. Alaniz-Moralez, Ms. Alazniz-Morales, or  
4 Mr. Salazar-Flores state that there are not *alternative* means of economic support for their families. There  
5 is no mention of other family members that may or may not be able to help the his immediate family  
6 financially. Furthermore, Mr. Alaniz-Moralez, Ms. Alazniz-Morales and Mr. Salazar-Flores were more  
7 than willing to leave their family members behind to come to the United States illegally with *no* guarantee  
8 that they would find a job that would allow them to send any money back to Mexico to support the people  
9 to whom they are now so desperate to return to.

10 Mr. Alaniz-Moralez, Ms. Alazniz-Morales, and Mr. Salazar-Flores argued that under Torres-Ruiz  
11 v. United States District Court, 120 F.3d 933, 935 (9th Cir. 1997), the fact that their continued incarceration  
12 constitutes an economic hardship for them and their families is sufficient to satisfy their burden of proof  
13 under Rule 15(a). Almost any period of incarceration, by definition, will result in some sort of financial  
14 hardship to that individual and his family. Economic hardship alone cannot constitute extraordinary  
15 circumstances. Rather, as the Court in Torres-Ruiz made clear, extraordinary circumstances require  
16 something more: in that case, "tremendous hardship." 120 F.3d at 936. In particular, the material  
17 witnesses in Torres-Ruiz were both "the sole support for their respective families in Mexico." Id. at 935  
18 (emphasis added). In the instant case, however, the material witnesses cannot establish such tremendous  
19 hardship as none have alleged that there are not others who will be able to support the clients family while  
20 in custody. Mayer Decl. at 4-5. Nothing is mentioned as to the extraordinary need or burden placed on his  
21 family by being in custody. The declaration simply sums up the regrettable but usual difficulties one might  
22 expect of being incarcerated. Obviously the material witnesses in this case, no less than Mr. Nunez-Gomez,  
23 would want to be free to help supplement their families with economic support, but absent tremendous  
24 facts, hardship alone is not sufficient to establish extraordinary circumstances warranting deposition  
25 testimony.

26 Furthermore, this Court should consider the unique circumstances faced by the Ninth Circuit in  
27 Torres-Ruiz. Unlike this case, in Torres-Ruiz the material witnesses' motion for videotape deposition was  
28 unopposed by the defendant. 120 F.3d at 934-35. Perhaps more importantly, in Torres-Ruiz, the defendant

1 entered a guilty plea less than two weeks after the motion for deposition was made, indicating that the case  
2 was already near disposition when the motion was made. Id. at 936-37. As of now, however, the instant  
3 case stands in a much different procedural posture.

4 Mr. Nunez-Gomez has pled not guilty to all counts of the Indictment. The defense has yet to conduct  
5 investigation **or even receive discovery** in this case. In short, it is very early in the case. To require  
6 Mr. Nunez-Gomez to cross-examine the material witnesses at the current juncture of the proceedings would  
7 severely prejudice his future trial rights. Any cross examination of the material witnesses at this point  
8 would be at best meaningless, and at worst ineffective and potentially harmful to Mr. Nunez-Gomez and  
9 his defense.

10 Finally, if the Court determines that the issue must be addressed at this point in time, the Court can  
11 easily resolve the issue by modifying the conditions of release for the material witnesses so that his  
12 continued detention would be unnecessary. Conditions of release for material witnesses is governed by 18  
13 U.S.C. § 3142. Under this section, “[t]he judicial officer **shall** order the pretrial release of the person on  
14 personal recognizance, or upon execution of an unsecured personal appearance bond . . . unless the judicial  
15 officer determines that such release will not reasonably assure the appearance of the person as required.”  
16 18 U.S.C. § 3142(b). Moreover, the Bail Reform Act states that “[t]he judicial officer may not impose a  
17 financial condition that results in the pretrial detention of the person.” 18 U.S.C. § 3142(c)(2). This  
18 mandate, combined with the preference for release upon one’s own recognizance, strongly suggests that  
19 the proper remedy for the material witnesses in this case is a motion to modify the terms of their release,  
20 not for the draconian remedy of immediately ordering a videotaped deposition and deporting the material  
21 witnesses to Mexico, especially not at this very early stage of the proceedings.

22 The material witnesses here alleges that they cannot secure a personal surety able to post an  
23 appearance bond. Nowhere, however, do the material witnesses state their unwillingness to remain in the  
24 United States during the pendency of this case. This Court can, and should, modify the material witnesses’  
25 bonds to allow them to re-gain their freedom, while at the same time safeguarding Mr. Nunez-Gomez’s  
26 Sixth Amendment rights. The material witnesses have no incentive not to come back to court to testify.  
27 The material witnesses are not being charged with a crime. The material witnesses have no incentive to  
28 flee the country. Indeed, if the statement of facts in support of the complaint in this case is to be believed,

1 these material witnesses were prepared to pay money to be smuggled illegally into the United States by  
2 friends in the United States. Therefore, they obviously wants to remain in this country, fully within the  
3 subpoena power of the Court.

4 **III.**

5 **CONCLUSION**

6 For the foregoing reasons, the Mr. Nunez-Gomez respectfully requests that this Court deny the  
7 material witnesses' motion for a videotaped deposition.

8 Respectfully submitted,

9 Dated: May 28, 2008

*s/ Candis Mitchell*

**CANDIS MITCHELL**

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